Petition

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81-1274

No.

IN THE

Supreme Court of the United States

October Term, 1981

WYNONA CLARADY ROBINSON
Petitioner

against

CITY OF JUNCTION CITY
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

QUESTION PRESENTED

Does the mandatory sentence provision under Junction City, Kansas, Ordinance 12-509 (b) deny the Petitioner's right of equal treatment under the law and against cruel and unusual punishment as secured and protected by the Fourteenth and Eighth Amendments to the Constitution to the United States?

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OPINIONS BELOW

1. The opinion of the Kansas Court of Appeals is reported unpublished under the name and style, *City of Junction City v. Wynona Clarady Robinson,* No. 80-52421-A, and is annexed hereto as Appendix B.

2. The decision of the Supreme Court of Kansas Denying review of the decision of the Kansas Court of Appeals in the case of *City of Junction City v. Wynona Clarady Robinson,* No. 80-52421-A, is unreported and attached hereto as Appendix C.

JURISDICTION

1. The judgment of the Supreme Court was entered on September 25, 1981 (infra, Appendix C). It is final by its terms.

2. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

3. The petition herein is filed at this time because of the unfortunate oversight of the attorney who was proceeding under the old rule 22 which was revised as rule 20, adopted on April 14, 1980 to become effective on June 30, 1980 shortening the time for filing from ninety days to sixty days.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the Constitution of the United States Provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED

This case involves Junction City, Kansas, Ordinance 12-509(a) and 12-509(b). These ordinances are attached hereto as Appendix A.

STATEMENT OF THE CASE

The City of Junction City, Kansas, filed a complaint against the Petitioner charging her with the criminal violation of solicitation for prostitution set forth in City Ordinance 12-509(a) (Appendix A).

A trial was held upon the charge in the Junction City Municipal Court and wherein the Petitioner was convicted of the charge of solicitation for prostitution.

On June 5, 1980, the Petitioner appealed her conviction to the District Court of Geary County, Kansas. Prior to the trial, Petitioner filed a motion to dismiss the charge against her on the grounds that the governing body of the City exceeded its statutory authority in enacting Ordinance 12-509(a). The motion was denied. A Jury trial was held in this court and the jury returned a verdict of solicitation for prostitution. Thereafter, the Petitioner filed a motion for a new trial which was overruled on July 23, 1980. She was thereupon sentenced to serve a mandatory sentence of thirty (30) days in the county jail

as provided under the City Ordinance 12-509(b) (Appendix A).

The Petitioner filed an appeal with the Kansas Court of Appeals from the district court's order overruling her motion for a new trial, the judgment of sentencing and the denial of Petitioner's challenge to the validity of the Ordinance under which she was convicted and sentenced.

In this appeal, the Petitioner argued that the mandatory sentence provisions under Ordinance 12-509(b) violated her constitutional rights in that the mandatory sentence constituted cruel and unusual punishment and denied her equal treatment under the law, all in violation of the Eighth and Fourteenth Amendments to the United States Constitution. On June 26, 1981, the Court of Appeals issued its decision affirming the Petitioner's conviction. The Court's opinion is unreported, but is attached as Appendix B.

The Petitioner filed a Petition for Review and a reversal of the Appellate court's decision. On September 25, 1981, the Kansas Supreme Court denied the Petitioner's Petition for Review. The Court's denial is unreported, but is attached as Appendix C. The Kansas Supreme Court is the court of last resort in the State of Kansas.

Therefore, Petitioner has filed this Writ of Certiorari for a review of her conviction and sentence rendered under City Ordinance 12-509(a) and 12-509(b).

REASONS FOR GRANTING THE WRIT

1. THE MANDATORY SENTENCE STATUTE VIOLATES THE CONSTITUTIONAL PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT

The mandatory sentence provision for the offence of solicitation of prostitution under City Ordinance 12-509(b) constitutes cruel and unusual punishment as enunciated by the Court in *Weems v. United States,* 217 U.S. 349, 54 L.Ed. 793, 30 S.Ct. 544. There the Court held that a criminal sanction offends the constitutional prohibition against cruel and unusual punishment where it is so disproportionate to the crime for which it is inflicted that it shocks the general conscience in light of concepts of elemental decency.

The consideration made to determine whether the punishment imposed is cruel and unusual is whether the punishment bears some reasonable relationship to the severity of the crime. *U.S. v. Avery,* 428 F.2d 1159 (CA 9, Ariz.), *cert. den.* 400 U.S. 903, 27 L.Ed. 139, 91 S.Ct. 140.

One factor to be considered in determining whether the punishment imposed is proportional to the severity of the crime is the relative severity of the punishment imposed for the offense in question as compared to the punishment imposed for more serious offenses and if the punishment imposed for the more serious offenses is less severe than for the offense in question the challenged penalty is at least suspect as being disproportionate to the offense. *State v. Coutcher,* 198 Kan. 282, 287, 424 P.2d 865, 33 A.L.R. 3rd 335.

In this case the sanction of a mandatory sentence for the offense of solicitation of prostitution is wholly dispropor-

tionate when compared to the penalty imposed for extremely more serious criminal offenses and the same offense committed in other cities. The punishment under Ordinance 12-509(b) is more severe than that imposed for any misdeameanor and most felonies within the State of Kansas. Probation may be granted under the state statute for any crime except those wherein a firearm is used. K.S.A. 21-4601 provides:

> "This article shall be liberally construed to the end that persons convicted of crime shall be dealt with in accordance with their individual characteristics, circumstances, needs, and potentialities as revealed by case studies; that dangerous offenders shall be correctively treated in custody for long terms as needed and that other offenders shall be dealt with by probation, suspended sentence, or fine whenever such disposition appears practicable and not detrimental to the needs of public safety and the welfare of the offender, or shall be committed for at least a minimum term within the limits provided by law."

The Legislature of Kansas has classified misdemeanors according to severity. Class A is most severe, Class B less and Class C even less. The State has labeled the crime of solicitation and prostitution as a Class B misdemeanor (K.S.A. 21-2512). Class A misdemeanors in which probation is possible and even likely upon a first conviction include:

1. Promoting prostitution – K.S.A. 21-3514
2. Indecent solicitation of a child – K.S.A. 21-3510
3. Unlawful restraint – K.S.A. 21-3424
4. Vehicular homicide – K.S.A. 21-3405

5. Endangering a child – K.S.A. 21-3608
6. Theft under $100 – K.S.A. 1978 Supp. 21-3701
7. Giving a worthless check under $50 – K.S.A. 21-3107
8. Criminal damage to property under $50 – K.S.A. 21-3720
9. Denial of civil rights – K.S.A. 21-4003
10. Riot – K.S.A. 21-4104
11. Criminal defamation – K.S.A. 21-4004
12. Giving a false alarm – K.S.A. 21-4110
13. Desecration of flag – K.S.A. 21-4114
14. Promoting obscenity – K.S.A. 21-4301
15. Promoting obscenity to minors – K.S.A. 21-4301(b)
16. Receiving a sports bribe – K.S.A. 21-4007
17. First conviction of possession of marijuana, LSD, methaqualone, secobarbital, pentobarbitol, phencyclidine, and many more – K.S.A. 21-1978 Supp. 65-4127(b).

The Legislature says all these crimes and more are more serious by degree than solicitation, yet probation is possible and even probable upon a first conviction.

Junction City City Ordinances provide for probation for leach offense committed within the City except prostitution and solicitation. Some of those offenses are:

1. Assault – City Ordinance 12-401
2. Battery – City Ordinance 12-402
3. Possession of marijuana – City Ordinance 12-523
4. Disorderly conduct – City Ordinance 12-406(a)
5. Riot – City Ordinance 12-407
6. Mobs – City Ordinance 12-408
7. Carrying a deadly weapon – City Ordinance 12-410
8. Assault with the weapon – City Ordinance 12-403
9. Gambling – City Ordinance 12-512

10. Furnishing liquor to a minor – City Ordinance 12-526
11. Pimping – City Ordinance 12-520
12. Resisting arrest – City Ordinance 12-604.

2. THE MANDATORY SENTENCE PROVISION VIOLATES PETITIONER'S RIGHT OF EQUAL PROTECTION UNDER THE LAW

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the state from according different treatment to persons under its laws unless there is a rational basis for the classification and distinction made. *Reed v. Reed*, 404 U.S. 71, 30 L.Ed.2d 225, 92 S.Ct. 251.

In Kansas, as well as in every other jurisdiction, the basis upon which punishment is prescribed for the various criminal offenses is their relative severity and injury to the community. As stated, in Kansas criminal offenses are classified as A, B, C, D and E misdemeanors and felonies dependant of the severity of the offense. The only reasonable and rational basis for prescribing more severe punishment for some crimes than others is there relative seriousness and adverse effects.

In this case, the sanction of a mandatory sentence for solicitation for prostitution under City Ordinance 12-509(b) bears absolutely no reasonable relationship to the severity of the offense when compared to the punishment imposed for other offenses. The mandatory sentence imposed for solicitation is wholly unreasonable and arbitrary where much more serious and violent crimes such as rape, assault and battery and the like are subject to probation.

Moreover, Petitioner has a protectable liability interest in a parole or probation, *Evans v. Dillahunty* ___Fed.2nd ____, 50 L.W. 2352, 8th Cir., 11/2/81.

Therefore, the distinction made between those persons convicted of solicitation for prostitution and those convicted of much more serious crimes is void of any rational basis and is thus prohibited by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION

Based upon the above and foregoing reasons, Petitioner's Petition for a Writ of Certiorari should be granted.

Respectfully submitted

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December 18, 1981

Appendix

APPENDIX A

Junction City Kansas City Ordinance 12-509(a)

SOLICITING OR PROCURING. Any person who shall solicit, procure, entice or induce any other person for purposes of prostitution or any other illicit sexual act for hire as defined in Section 12-508 of the Revised Ordinances of the City of Junction City, Kansas (1965), shall be guilty of a misdemeanor.

Junction City Kansas City Ordinance 12-509(b)

PENALTY. Every person convicted under Section 12-509(a) shall be punished under guidelines of Section 12-107, the General Penalty section of the Revised Ordinances of the City of Junction City, Kansas (1965). However, upon a first conviction, the Court shall impose a mandatory minimum jail sentence of thirty (30) days, and no person shall be eligible for probation or parole until serving the entire minimum sentence. Upon a second conviction, the Court shall impose a mandatory minimum jail sentence of ninety (90) days, and no person shall be eligible for probation or parole until serving the entire minimum sentence. Upon a third or subsequent conviction, the Court shall impose a mandatory minimum jail sentence of one hundred fifty (150) days, and no person shall be eligible for probation or parole until serving the entire minimum sentence.

For the sake of efficiency, the case captions have been removed from Appendix B and Appendix C.

APPENDIX B

THE OPINION OF THE KANSAS COURT OF APPEALS IN THE NAME AND STYLE OF CITY OF JUNCTION CITY v. WYNONA CLARADY ROBINSON

Appeal from Geary District Court; Melvin M. Gradert, associate judge. Opinion filed June 26, 1981. Affirmed.

Charles S. Scott, Sr., of Scott, Scott, Scott & Scott, of Topeka, for appellant.

Steven W. Brown, of Hoover, Schermerhorn, Edwards & Pinaire, of Junction City, for appellee.

Before FOTH, C.J., ABBOTT and SWINEHART, J.J.

Per Curiam:. This a direct appeal by the defendant, Wynona Clarady Robinson, from her conviction of soliciting for prostitution in violation of Junction City, Kansas, Ordinance No. 12-509(a). The parties are acquainted with the facts of the case, so they will not be summarized here.

Defendant sets out two major issues for our consideration:

(1) Does Junction City Ordinance No. 12-509 violate constitutional principles:

A. Is Ordinance No. 12-509(a) the result of an unconstitutional exercise of home rule powers?

B. Does Ordinance No. 12-509(b) subject a defendant to cruel and unusual punishment?

C. Does Ordinance No. 12-509(b) violate equal protection?

D. Is Ordinance No. 12-509(b) overbroad?

(2) Did the trial court err in refusing to give defendant's requested instruction on entrapment, and in refusing to instruct the jury on the issue of the defendant's good reputation?

In City of *Junction City v. Griffin,* 227 Kan. 332, 607 P.2d 459 (1980), the Kansas Supreme Court had occasion to consider the constitutionality of Junction City Ordinance No. 12-509(a) and (b). In that case, the court rejected the contention that the legislature had preempted this area of criminal law and held the ordinance to be a valid provision passed by the city under its home rule powers (at pages 336-337). Defendant in the present case does not quarrel with *Griffin,* but chooses to challenge the constitutionality of ordinance No. 12-509(a) on the ground the city has created a new criminal offense (soliciting for prostitution) not punishable under the present state criminal code, which she contends is an impermissible exercise of municipal authority. Junction City Ordinance No. 12-509(a) states:

> "Any person who shall solicit, procure, entice or induce any other person for purposes of prostitution or any other illicit sexual act for hire as defined in Section 12-508 of the Revised Ordinances of the City of Junction City, Kansas (1965), shall be guilty of a misdemeanor."

In our opinion, soliciting for prostitution is a violation of current Kansas state law. K.S.A. 1980 Supp. 21-3512 states:

> "(1) Prostitution is performing for hire, or offering or agreeing to perform for hire where there is an exchange of value, any of the following acts:

(a) Sexual intercourse; or
(b) oral or anal copulation; or
(c) manual or other bodily contact stimulation of the genitals of any person with the intent to arouse or gratify the sexual desires of the offender or another.

"(2) Prostitution is a class B misdemeanor."

This statute makes it unlawful to *offer* to perform sexual activities for hire. Solicitation as the terms is used in 21-3512 is the equivalent of an offer to perform sexual services. See *State v. Dodson,* 222 Kan. 519, 525, 565 P.2d 291 (1977); Annot., 77 A.L.R. 3d 519, § 21(a). Furthermore, it appears the legislature specifically intended to expand the scope of unlawful activity when it introduced the word "offering" to the statute in 1970:

> "The verb 'offering' incorporates the former prohibitions on 'soliciting' and connotes *less* urging and invitation by the prostitute." Vernon's Kan. Crim. C. § 21-3512, Comments (1971) (emphasis supplied)

Since 21-3512 fully encompasses the crime of soliciting for prostitution, Junction City did not carve out any new offense.

Defendant's arguments that ordinance No. 12-509(b) imposes cruel and unusual punishment and that it violates equal protection was recently rejected by the Kansas Supreme Court in *City of Junction City v. Griffin,* 227 Kan. at 338-339, and we are bound by the rule in that case.

Defendant's argument that the ordinance is overbroad is without merit. An overbroad statute is one that makes punishable conduct that under some circumstances is constitutionally protected from criminal sanctions. *State v.*

Stauffer Communications, Inc., 225 Kan. 540, 547, 592 P.2d 891 (1979). Here, ordinance No. 12-509(b) does not define the scope of criminal conduct, but merely prescribes the legal punishment to be meted out once the prohibited conduct occurs. The concept of constitutional overbreadth has no application to the facts before us.

Defendant's complaint that 12-509(b) impermissibly removes discretion in sentencing from the hands of the trial judge is, in essence, the separation of powers argument advanced in *City of Junction City v. Griffin*, wherein the court responded:

> "Finally it is argued the mandatory sentence provision of the ordinance deprives the defendant of liberty without due process of law because the ordinance takes away a prerogative of the judicial branch of government, that of fixing a sentence commersurate with the seriousness of the crime. In *Freeman*, 223 Kan. 362, Syl. 6, we held the provisons of K.S.A. 1977 Supp. 21-4618 and 22-3717(8), which deny probation and parole privileges to a defendant convicted of using a firearm in the commission of an Article 34 crime, do not impose such a restriction on the judicial power of the sentencing judge as would constitute an impermissible legislative usurpation of the court's prerogatives.
>
> "Accordingly, we hold the ordinance was valid and within the home rule powers of the city." 227 Kan. at 339.

Defendant's asserted constitutional infirmities lack merit.

Defendant contends she was entitled to an instruction on entrapment as requested by her counsel at trial. Entrap-

ment was the subject of discussion in the recent case of *State v. Smith,* 229 Kan. 533, 625 P.2d 1139 (1981):

> "The defense of entrapment is provided for in K.S.A. 21-3210 which provides as follows:
>
> '21-3210. Entrapment. A person is not guilty of a crime if his criminal conduct was induced or solicited by a public officer or his agent for the purpose of obtaining evidence to prosecute such person, unless:
>
> (a) The public officer or his agent merely afforded an opportunity or facility for committing the crime in furtherance of a criminal purpose originated by such person or a coconspirator; or
>
> (b) The crime was a type which is likely to occur and recur in the course of such person's business, and the public officer or his agent in doing the inducing or soliciting did not mislead such person into believing his conduct to be lawful.'
>
> "Under the Kansas decisions, a trial court is bound to give an entrapment instruction when evidence is given which supports entrapment as a defense. *State v. Amodei,* 222 Kan. 140, 142, 563 P.2d 440 (1977). The defendant, however, has the burden of introducing evidence that supports his theory. *State v. Carter,* 214 Kan. 533, 535, 521 P.2d 294 (1974). The defense may be rejected as a matter of law where the basic elements are not established. *State v. Reichenberger,* 209 Kan. 210, 218, 495 P.2d 919 (1972)." 229 Kan. at 534-535.

The defense of entrapment is generally not available to a defendant who denies that he has committed the offense charged. *State v. Farmer,* 212 Kan. 163, 510 P.2d 180 (1973). The Supreme Court elaborated on this rule in *State v. Einhorn,* 213 Kan. 271, 515 P.2d 1036 (1973):

> "A defendant who refused to admit any involvement in an incident out of which a criminal charge arises cannot use entrapment as a defense. A defendant who admits the acts charged by the state, but claims the acts fail to support criminal charge, may raise entrapment as an additional defense. In situations where the defendant admits some involvement, but fails to admit all the facts alleged by the state, he may or may not be entitled to claim entrapment, depending on the degree of involvement he admits. Admission of substantial involvement would tend to permit the defense, while slight and limited admission would tend to deny the defense." (Syl. 1)

The case at hand falls within the middle range of the rule; the defendant admits meeting and speaking with the police officers, but denies soliciting them. In effect, defendant denies that the crime of solicitation or any of its elements occurred, and based on the record before us we are of the opinion the trial court correctly denied defendant's requested instruction on entrapment.

Defendant also contends that she was entitled to an instruction on "the issue of her good reputation." Defendant, however, failed to submit a written request for the instruction to the trial judge. K.S.A. 22-3414 states in relevant part: "(3) . . . All instructions given or requested must be filed as a part of the record of the case." Without such an inclusion in the record, this court cannot find

reversible error in the refusal to give the requested instruction, even though a properly drawn instruction might have clarified the defendant's theory. Thus, we cannot say the trial court erred in failing to give an instruction concerning the accused's reputation. *State v. Reed,* 213 Kan. 557, 562, 516 P.2d 913 (1973); *State v. Skinner,* 210 Kan. 354, 358, 362, 503 P.2d 168 (1972). We express no opinion whether an accused might be entitled to such an instruction, but do note that PIK does not include one.

Finally, defendant contends that the trial court errerd in denying her motion for new trial. No new grounds for reversal are presented in her motion other than those already disposed of in this opinion.

Affirmed.

APPENDIX C

DENIAL OF REVIEW BY THE KANSAS SUPREME COURT

You are hereby notified of the following action taken in the above entitled case:

PETITION FOR REVIEW.

DENIED.

September 25, 1981

Opposition

Rec. 3-29-82

TO BE PRINTED

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-1274

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Petitioner

v.

CITY OF JUNCTION CITY,
Respondent

BRIEF IN OPPOSITION
TO
PETITION FOR CERTIORARI

Submitted by:

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Junction City

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BRIEF IN OPPOSITION
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Comes now the respondent, City of Junction City, by and through Mara Edwards, Assistant City Attorney, and in opposition to the Petition for Writ of Certiorari, filed herein, shows this Court as follows:

OPINIONS BELOW

1. The opinion of the Kansas Court of Appeals is reported unpublished under the name and style, City of Junction City v. Wynona Clarady Robinson, No. 80-52421-A, and is annexed hereto as Appendix A.

2. The decision of the Supreme Court of Kansas denying review of the decision of the Kansas Court of Appeals in the case of City of Junction City v. Wynona Clarady Robinson, No. 80-52421-A, is unreported and attached hereto as Appendix B.

ORDINANCE INVOLVED

Junction City Kansas City Ordinance 12-509(a)

SOLICITING OR PROCURING. Any person who shall solicit, procure, entice or induce any other person for purposes of prostitution or any other illicit sexual act for hire as defined in Section 12-508 of the Revised Ordinances of the City of Junction City, Kansas (1965), shall be guilty of a misdemeanor.

Junction City Kansas City Ordinance 12-509(b)

PENALTY. Every person convicted under Section 12-509(a) shall be punished under guidelines of Section 12-107, the General Penalty section of the Revised Ordinances of the City of Junction City, Kansas (1965). However, upon a first conviction, the Court shall impose a mandatory minimum jail sentence of thirty (30) days, and no person shall be eligible for probation or parole until serving

the entire minimum sentence. Upon a second conviction, the Court shall impose a mandatory minimum jail sentence of ninety (90) days, and no person shall be eligible for probation or parole until serving the entire minimum sentence. Upon a third or subsequent conviction, the Court shall impose a mandatory minimum jail sentence of one hundred fifty (150) days, and no person shall be eligible for probation or parole until serving the entire minimum sentence.

QUESTIONS PRESENTED

I

Does Junction City Ordinance No. 12-509 violate constitutional principles:

A. Is Ordinance No. 12-509(a) the result of an unconstitutional exercise of home rule powers?

B. Does Ordinance No. 12-509(b) subject a defendant to cruel and unusual punishment?

C. Does Ordinance No. 12-509(b) violate equal protection?

D. Is Ordinance No. 12-509(b) overbroad?

II

Did the trial court err in refusing to give defendant's requested instruction on entrapment, and in refusing to instruct the jury on the issue of the defendant's good reputation?

STATEMENT OF THE CASE

The City of Junction City, Kansas, filed a complaint against the Petitioner charging her with the criminal violation of solicitation for prostitution set forth in City Ordinance 12-509(a).

A trial was held upon the charge in the Junction City Municipal Court and wherein the Petitioner was convicted of the charge of solicitation for prostitution.

On June 5, 1980, the Petitioner appealed her conviction to the District Court of Geary County, Kansas. Prior to the trial, Petitioner filed a motion to dismiss the charge against her on the grounds that the governing body of the City exceeded its statutory authority in enacting Ordinance 12-509(a). The motion was denied. A Jury trial was held in this court and the jury returned a verdict of solicitation for prostitution. Thereafter, the Petitioner filed a motion for a new trial which was overruled on July 25, 1980. She was thereupon sentenced to serve a mandatory sentence of thirty (30) days in the county jail as provided under the City Ordinance 12-509(b).

The Petitioner filed an appeal with the Kansas Court of Appeals from the district court's order overruling her motion for a new trial, the judgment of sentencing and the denial of Petitioner's challenge to the validity of the Ordinance under which she was convicted and sentenced.

In this appeal, the Petitioner argued that the mandatory sentence provisions under Ordinance 12-509(b) violated her constitutional rights in that the mandatory sentence constituted cruel and unusual punishment and denied her equal treatment under the law, all in violation of the Eighth and

Fourteenth Amendments to the United States Constitution. On June 26, 1981, the Court of Appeals issued its decision affirming the Petitioner's conviction. The Court's opinion is unreported, but is attached as Appendix A.

The Petitioner filed a Petition for Review and a reversal of the Appellate court's decision. On September 29, 1981, the Kansas Supreme Court denied the Petitioner's Petition for Review. The Court's denial is unreported, but is attached as Appendix B. The Kansas Supreme Court is the court of last resort in the State of Kansas.

Therefore, Petitioner has filed this Writ of Certiorari for a review of her conviction and sentence rendered under City Ordinance 12-509(a) and 12-509(b).

REASONS FOR DENYING THE WRIT

1. THE MANDATORY SENTENCE ORDINANCE DID NOT VIOLATE THE CONSTITUTIONAL PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT

In determining whether the length of a sentence offends the constitutional prohibition against cruel punishment three techniques should be considered, as set forth in State v. Freeman, 223 Kan. 362, 574 P.2d 95 (1978):

> "(1) The nature of the offense and the character of the offender should be examined with particular regard to the degree of danger present to society; relevant to this inquiry are the facts of the crime, the violent or nonviolent nature of the offense, the extent of the culpability for the injury resulting, and the penological purposes of the prescribed punishment;
>
> (2) A comparison of the punishment with punishment imposed in this jurisdiction for more serious offenses, and if among them are found more serious crimes punished less severely than the offense in question the challenged penalty is to that extent suspect; and
>
> (3) A comparison of the penalty with punishments in other jurisdictions for the same offense."

The standard set forth in Freeman was applied by the Supreme Court of the State of Kansas in City of Junction City v. Griffin, 227 Kan. 332, 607 P.2d 459 (1980), wherein the constitutionality of the mandatory sentence Ordinance No. 12-509 was upheld. The Kansas Supreme Court held that, "after applying these tests to the facts of the present case, in which a 30-day mandatory jail sentence without probation was imposed for soliciting for prostitution, we hold the sentence does not offend. The punishment, a 30-day mandatory jail sentence without probation, is neither cruel nor unusual in its method, nor so disproportionate to the crime of solicitation for prostitution that it shocks the conscience and offends fundamental notions of human dignity." See Griffin, 227 Kan. 339.

As set forth in the discussion by the Supreme Court in the Griffin case, Junction City is adjacent to a large military reservation (Fort Riley) where two brigades of United States Army troops are stationed. Prostitution is notoriously a problem in towns that are adjacent to military reservations. The City Commission was well aware of its past problems in this area when it adopted the mandatory sentence ordinance. The mandatory jail sentence was adopted in an effort to alleviate this problem.

2. THE MANDATORY SENTENCE PROVISION DOES NOT VIOLATE PETITIONER'S RIGHT OF EQUAL PROTECTION UNDER THE LAW

This constitutional argument was also set forth in City of Junction City v. Griffin, 227 Kan. 332, 607 P.2d 459 (1980). The Kansas Supreme Court did not find the contention that the mandatory sentence denied equal protection of the laws was persuasive and ruled that, "A State statute or a city ordinance may single out a class of persons for distinctive treatment if the classification bears a rational relation to the purpose of the legislation and if persons similarly inclined will receive like treatment." See Griffin, 227 Kan. 332-339.

CONCLUSION

Based upon the foregoing reasons, Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent

APPENDIX A

NOT DESIGNATED FOR PUBLICATION

No. 52,421

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

CITY OF JUNCTION CITY, KANSAS,
Appellee,

v.

WYNNOA CLARDY ROBINSON,
Appellant.

MEMORANDUM OPINION

Appeal from Geary District Court; MELVIN M. CRADERT, associate judge. Opinion filed June 26, 1981. Affirmed.

Charles S. Scott, Sr., of Scott, Scott, Scott & Scott, of Topeka, for appellant.

Steven W. Brown, of Hoover, Schermerhorn, Edwards & Pinaire, of Junction City, for appellee.

Before FOTH, C.J., ABBOTT and SWINEHART, JJ.

Per Curiam: This is a direct appeal by the defendant, Wynnoa Clardy Robinson, from her conviction of soliciting for prostitution in violation of Junction City, Kansas, Ordinance No. 12-509(a). The parties are acquainted with the facts of the case, so they will not be summarized here.

Defendant sets out two major issues for our consideration:

(1) Does Junction City Ordinance No. 12-509 violate constitutional principles:

A. Is ordinance No. 12-509(a) the result of an unconstitutional exercise of home rule powers?

B. Does ordinance No. 12-509(b) subject a defendant to cruel and unusual punishment?

C. Does ordinance No. 12-509(b) violate equal protection?

D. Is ordinance No. 12-509(b) overbroad?

(2) Did the trial court err in refusing to give defendant's requested instruction on entrapment, and in refusing to instruct the jury on the issue of the defendant's good reputation?

In City of Junction City v. Griffin, 227 Kan. 332, 607 P.2d 459 (1980), the Kansas Supreme Court had occasion to consider the constitutionality of Junction City Ordinance No. 12-509(a) and (b). In that case, the court rejected the contention that the legislature had preempted this area of criminal law and held the ordinance to be a valid provision passed by the city under its home rule powers (at pages 336-37). Defendant in the present case does not quarrel with Griffin, but chooses to challenge the constitutionality of ordinance No. 12-509(a) on the ground the city has created a new criminal offense (soliciting for prostitution) not punishable under the present state criminal code, which she contends is an impermissible exercise of municipal authority. Junction City Ordinance No. 12-509(a) states:

> "Any person who shall solicit, procure, entice or induce any other person for purposes of prostitution or any other illicit sexual act for hire as defined in Section 12-508 of the Revised Ordinances of the City of Junction City, Kansas (1965), shall be guilty of a misdemeanor."

In our opinion, soliciting for prostitution is a violation of current Kansas state law. K.S.A. 1980 Supp. 21-3512 states:

> "(1) Prostitution is performing for hire, or offering or agreeing to perform for hire where there is an exchange of value, any of the following acts:
>
> (a) Sexual intercourse; or
>
> (b) oral or anal copulation; or
>
> (c) manual or other bodily contact stimulation of the genitals of any person with the intent to arouse or gratify the sexual desires of the offender or another.
>
> "(2) Prostitution is a class B misdemeanor."

This statute makes it unlawful to offer to perform sexual activities for hire. Solicitation as the term is used in 21-3512 is the equivalent of an offer to perform sexual services. See State v. Dodson, 222 Kan. 519, 525, 565 P.2d 291 (1977); Annot., 77 A.L.R. 3d 519, § 21[a]. Furthermore, it appears the legislature specifically intended to expand the scope of unlawful activity when it introduced the word "offering" to the statute in 1970:

> "The verb 'offering' incorporates the former prohibitions on 'soliciting' and connotes less urging and invitation by the prostitute." Vernon's Kan. Crim. C. § 21-3512, Comments (1971) (emphasis supplied).

Since 21-3512 fully encompasses the crime of soliciting for prostitution, Junction City did not carve out any new offense.

Defendant's arguments that ordinance No. 12-509(b) imposes cruel and unusual punishment and that it violates equal protection

were recently rejected by the Kansas Supreme Court in City of Junction City v. Griffin, 227 Kan. at 338-39, and we are bound by the rule in that case.

Defendant's argument that the ordinance is overbroad is without merit. An overbroad statute is one that makes punishable conduct that under some circumstances is constitutionally protected from criminal sanctions. State v. Stauffer Communications, Inc., 225 Kan. 540, 547, 592 P.2d 891 (1979). Here, ordinance No. 12-509(b) does not define the scope of criminal conduct, but merely prescribes the legal punishment to be meted out once the prohibited conduct occurs. The concept of constitutional overbreadth has no application to the facts before us.

Defendant's complaint that 12-509(b) impermissibly removes discretion in sentencing from the hands of the trial judge is, in essence, the separation of powers argument advanced in City of Junction City v. Griffin, wherein the court responded:

> "Finally it is argued the mandatory sentence provision of the ordinance deprives the defendant of liberty without due process of law because the ordinance takes away a prerogative of the judicial branch of government, that of fixing a sentence commensurate with the seriousness of the crime. In Freeman, 223 Kan. 362, Syl. ¶ 6, we held the provisions of K.S.A. 1977 Supp. 21-4618 and 22-3717(8), which deny probation and parole privileges to a defendant convicted of using a firearm in the commission of an Article 34 crime, do not impose such a restriction on the judicial power of the sentencing judge as would constitute an impermissible legislative usurpation of the court's prerogatives.

"Accordingly, we hold the ordinance was valid and within the home rule powers of the city." 227 Kan. at 339.

Defendant's asserted constitutional infirmities lack merit.

Defendant contends she was entitled to an instruction on entrapment as requested by her counsel at trial. Entrapment was the subject of discussion in the recent case of State v. Smith, 229 Kan. 533, 625 P.2d 1139 (1981):

"The defense of entrapment is provided for in K.S.A. 21-3210 which provides as follows:

'21-3210. Entrapment. A person is not guilty of a crime if his criminal conduct was induced or solicited by a public officer or his agent for the purposes of obtaining evidence to prosecute such person, unless:

'(a) The public officer or his agent merely afforded an opportunity or facility for committing the crime in furtherance of a criminal purpose originated by such person or a coconspirator; or

'(b) The crime was a type which is likely to occur and recur in the course of such person's business, and the public officer or his agent in doing the inducing or soliciting did not mislead such person into believing his conduct to be lawful.'

Under the Kansas decisions, a trial court is bound to give an entrapment instruction when evidence is given which supports entrapment as a defense. State

v. Amodei, 222 Kan. 140, 142, 563 P.2d 440 (1977). The defendant, however, has the burden of introducing evidence that supports his theory. State v. Carter, 214 Kan. 533, 535, 521 P.2d 294 (1974). The defense may be rejected as a matter of law where the basic elements are not established. State v. Reichenberger, 209 Kan. 210, 218, 495 P.2d 919 (1972)." 229 Kan. at 534-35.

The defense of entrapment is generally not available to a defendant who denies that he has committed the offense charged. State v. Farmer, 212 Kan. 163, 510 P.2d 180 (1973). The Supreme Court elaborated on this rule in State v. Einhorn, 213 Kan. 271, 515 P.2d 1036 (1973):

> "A defendant who refuses to admit any involvement in an incident out of which a criminal charge arises cannot use entrapment as a defense. A defendant who admits the acts charged by the state, but claims the acts fail to support a criminal charge, may raise entrapment as an additional defense. In situations where the defendant admits some involvement, but fails to admit all the facts alleged by the state, he may or may not be entitled to claim entrapment, depending on the degree of involvement he admits. Admission of substantial involvement would tend to permit the defense, while slight and limited admission would tend to deny the defense." (Syl. ¶ 1.)

The case at hand falls within the middle range of the rule; the defendant admits meeting and speaking with the police officers, but denies soliciting them. In effect, defendant denies that the

crime of solicitation or any of its elements occurred, and based on the record before us we are of the opinion the trial court correctly denied defendant's requested instruction on entrapment.

Defendant also contends that she was entitled to an instruction on "the issue of her good reputation." Defendant, however, failed to submit a written request for the instruction to the trial judge. K.S.A. 22-3414 states in relevant part: "(3) . . . All instructions given or requested must be filed as a part of the record of the case." Without such an inclusion in the record, this court cannot find reversible error in the refusal to give the requested instruction, even though a properly drawn instruction might have clarified the defendant's theory. Thus, we cannot say the trial court erred in failing to give an instruction concerning the accused's reputation. State v. Reed, 213 Kan. 557, 562, 516 P.2d 913 (1973); State v. Skinner, 210 Kan. 354, 358, 362, 503 P.2d 168 (1972). We express no opinion whether an accused might be entitled to such an instruction, but do note that PIK does not include one.

Finally, defendant contends that the trial court erred in denying her motion for new trial. No new grounds for reversal are presented in her motion other than those already disposed of in this opinion.

Affirmed.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF KANSAS

City of Junction City, Appellee,

v.

Wynona Clarady Robinson, Appellant.

No. 80-52421-A

You are hereby notified of the following action taken in the above entitled case:

PETITION FOR REVIEW.

DENIED.

Date September 25, 1981

Yours very truly,

LEWIS C. CARTER
Clerk, Supreme Court